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DIAGEO BRANDS BV, DIAGEO NORTH AMERICA,  
INC., AND DIAGEO SCOTLAND LIMITED

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re:

FAIRN & SWANSON, INC.,

Debtor.

Case No.: 20-40990-RLE

Chapter 7

**DIAGEO'S COMPLAINT FOR  
DECLARATORY RELIEF TO  
DETERMINE (1) WHETHER DIAGEO'S  
PRODUCTS ARE PROPERTY OF THE  
ESTATE; (2) THE EXTENT OF WELLS  
FARGO'S SECURITY INTEREST IN THE  
DIAGEO PRODUCTS; AND (3) IN THE  
ALTERNATIVE, WHETHER THE  
TRUSTEE IS PROHIBITED FROM  
ASSUMING AND ASSIGNING THE  
DISTRIBUTION AGREEMENTS ABSENT  
DIAGEO'S CONSENT OR WHETHER  
THEY MAY BE TERMINATED  
PURSUANT TO 11 U.S.C. § 365(e)**

DIAGEO BRANDS BV, DIAGEO  
SCOTLAND LIMITED, and DIAGEO  
NORTH AMERICA, INC.,

Plaintiffs,

v.

LOIS I. BRADY, as Trustee for the Chapter  
7 estate of FAIRN & SWANSON, INC., and  
WELLS FARGO BANK, NATIONAL  
ASSOCIATION

Defendants.

Adv. Proc. No. \_\_\_\_\_

Diageo Brands BV, Diageo Scotland Limited, and Diageo North America, Inc. (collectively “**Diageo**”) files this *Complaint For Declaratory Relief* (the “**Complaint**”) and would respectfully show the Court as follows:

### **NATURE OF THE CASE**

1. Diageo brings this adversary proceeding to obtain declaratory judgment determining the respective rights and interests between Diageo, Lois L. Brady, the Chapter 7 Trustee (“**Trustee**”) in the above-captioned bankruptcy case, Wells Fargo Bank, N.A. (“**Wells Fargo**”), and any prospective buyers of Diageo’s trademarked goods. At the time of the bankruptcy filing, Fairn & Swanson, Inc. (the “**Debtor**”) had millions of dollars’ worth of beer and spirits in its possession pursuant to a non-exclusive license to sell Diageo’s goods at the U.S./Mexico border and on marine vessels such as cruise ships.

2. The distribution agreements between Diageo and Debtor govern the sale of these trademarked goods, and those contracts are governed by English law pursuant to the choice of law clauses agreed to by the parties. England bears a close connection to these international commercial contracts given Diageo’s parent company is based in London, and many of Diageo’s trademarked products are produced in and shipped from the United Kingdom (“**UK**”).

3. The distribution agreements between Diageo and Debtor required the Debtor to pay the purchase price in full before legal and beneficial title of the goods would pass to Debtor, and until then absolute title was retained by Diageo. This condition existed notwithstanding delivery to and possession by Debtor and is recognized under English law as a valid condition precedent to the transfer of title such that the seller retains an unencumbered interest in the delivered goods that is superior to the interests of the buyer and its secured creditors. Diageo now seeks a declaration from this Court that upholds these legal principals. The law of England,

1 and specifically the UK Sale of Goods Act 1979, recognizes the validity of retention of title  
2 clauses, unlike law in the United States that treats retention of title clauses as nothing more than  
3 just a security interest in favor of the seller.  
4

5 4. In the alternative, even if title to the goods passed to the Debtor, the Debtor's  
6 use of the goods is based upon the license of the Diageo trademarks. Without the license  
7 provided under the distribution agreements, the Trustee may not use or sell the Diageo products  
8 without Diageo's consent, and Diageo has the right to terminate the distribution agreements.  
9

#### 10 **NOTICE OF RELIANCE ON FOREIGN LAW**

11 5. Diageo hereby provides notice of its intent to rely on a foreign country's law in  
12 accordance with Federal Rule of Civil Procedure 44.1 made applicable by Federal Rule of  
13 Bankruptcy Procedure 9017. More specifically, Diageo intends to rely on English law as to  
14 Counts 1 and 2 in accordance with the parties' choice of law provision in the contracts  
15 governing their transactions.  
16

#### 17 **JURISDICTION AND VENUE**

18 6. This Court has subject matter jurisdiction to consider this matter pursuant to 28  
19 U.S.C. §§ 157, 1334, and 2201. This matter is a core proceeding under 28 U.S.C. § 157(b).  
20

21 7. This adversary proceeding has been commenced in accordance with Rule 7001  
22 of the Federal Rules of Bankruptcy Procedure and is a core proceeding under 28 U.S.C. § 157(b).  
23

24 8. Venue is proper as provided in 28 U.S.C. § 1409 because this adversary  
25 proceeding is related to and arises in Debtor's bankruptcy case pending in this District (the  
26 "Bankruptcy Case").  
27

28 9. This Court has jurisdiction over the Trustee as the representative of the Debtor's  
bankruptcy estate (the "Estate"). This Court has jurisdiction over Wells Fargo because Wells

1 Fargo has submitted to the Court's jurisdiction by appearing in the Bankruptcy Case and filing  
2 a proof of claim on July 8, 2020.

3 **PARTIES**

4  
5 10. Plaintiffs Diageo Brands BV, Diageo Scotland Limited, and Diageo North  
6 America, Inc. are producer and/or supplier affiliates of Diageo plc, a London-based  
7 multinational beverage and alcohol company of some of the most well-known alcohol brands  
8 (the "**Diageo Products**") including Buchanan's, Johnnie Walker, Smirnoff, Guinness, Harp,  
9 Crown Royal, and Tanqueray gin just to name a few.

10  
11 11. Defendant Lois I. Brady is the duly appointed Trustee for the Chapter 7 estate of  
12 Fairn & Swanson, Inc. and in that capacity is the proper party in interest to defend against the  
13 relief requested herein. The Trustee may be served with process where she regularly conducts  
14 business pursuant to Rule 7004(b)(1) by first class mail as follows: Lois I. Brady, Chapter 7  
15 Trustee, P.O. Box 12425, Oakland, CA 94604.

16  
17 12. Defendant Wells Fargo provided funding to Debtor pre-petition pursuant to  
18 various loan documents that describe a blanket security interest in all property of the Debtor.  
19 Wells Fargo, an insured depository institution, has appeared in the Bankruptcy Case by its  
20 attorney, and therefore may be served by its attorney pursuant to Rule 7004(h)(1) by first class  
21 mail as follows: Jonathan Doolittle, Pillsbury Winthrop Shaw Pittman, LLP, Four Embarcadero  
22 Center, 22<sup>nd</sup> Floor, San Francisco, CA 94111.

23 **BACKGROUND**

24  
25 13. On June 2, 2020 (the "**Petition Date**"), Debtor filed chapter 7 bankruptcy in the  
26 United States Bankruptcy Court for the Northern District of California, Oakland Division.

1           14. Prior to filing bankruptcy, Debtor was in the business of selling and supplying  
2 duty free products to duty free shops through two distribution channels: (1) Duty free shops  
3 near the U.S./Mexico border, and (2) marine vessels such as cruise ships.  
4

5           15. Diageo granted Debtor a non-exclusive license to sell Diageo Products in these  
6 distribution channels.

7           16. Diageo, together with its parent company, Diageo plc, has a collection of over  
8 200 brands of trademarked spirits and beer, many of which are produced in and shipped from  
9 the UK, and sold in more than 180 countries around the world.  
10

11           17. Diageo is very selective with whom it does business in order to protect its global  
12 reputation, goodwill, brand recognition and integrity, and to prevent market saturation in certain  
13 territories. To further these goals, Diageo tailors its distribution agreements to narrowly  
14 authorize the use of its intellectual property (including trademarks) in connection with the sale  
15 of its products.  
16

17           18. On April 25, 2007, certain Diageo entities and Debtor entered into a  
18 “Distribution Agreement relating to Duty Free Market U.S./Mexico Border” (the “**Mexico**  
19 **Border Distribution Agreement**”). Then on May 1, 2013, Diageo Scotland Limited and  
20 Debtor entered into a letter agreement for the distribution of duty-free spirits for resale on  
21 marine vessels such as cruise lines (the “**Marine Distribution Agreement**,” and together with  
22 the Mexico Border Distribution Agreement, the “**Diageo Products Distribution**  
23 **Agreements**”).<sup>1</sup>  
24  
25  
26  
27

28           <sup>1</sup> Pursuant to an intercompany agreement, Diageo Brands BV handles invoicing and collection on behalf  
of Diageo Scotland Limited under the Marine Distribution Agreement.

1           19.     The Diageo Products Distribution Agreements were amended from time-to-time,  
2 but the material terms of the core business relationship between Diageo and the Debtor  
3 remained constant since its inception.  
4

5           20.     The Mexico Border Distribution Agreement governs all transactions between  
6 the parties with respect to Diageo Products to be sold at duty free shops on the U.S./Mexico  
7 border. It provides, among other things, that Diageo would:

- 8               a.    Supply Debtor with duty free spirits for resale in a specified territory;<sup>2</sup> and  
9               b.    Authorize Debtor to use the certain trademarks in connection with the sale of its  
10               products in the specified territory.<sup>3</sup>  
11

12 In exchange, Debtor agreed to, among other things:

- 13               a.    Pay for all products within 90 days;<sup>4</sup>  
14               b.    Ensure that any reference or use of any trademark or IP owned by Diageo would  
15               only be used after Diageo's written approval;<sup>5</sup>  
16               c.    Refrain from assigning all or any part of the rights outlined in the Mexico Border  
17               Distribution Agreement to any third party;<sup>6</sup>  
18               d.    Promptly notify Diageo of any suspected infringement of the Distributor Parties'  
19               IP within the specified market territory in order for Diageo to defend or control  
20               such action.<sup>7</sup>  
21  
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26               <sup>2</sup> The specified territory is defined as duty free shops on the U.S./Mexico border. *See generally*, Mexico  
27               Border Distribution Agreement, at 7, ¶12.

28               <sup>3</sup> *Id.* at 18-19, ¶17.

<sup>4</sup> Mexico Border Distribution Agreement, at 9, ¶4.

<sup>5</sup> *Id.* at 18-19, ¶17.

<sup>6</sup> *Id.* at 24, ¶21.

<sup>7</sup> *Id.* at 20, ¶17.8.

1           21.     The Mexico Border Distribution Agreement also provides that Diageo may  
2 terminate the Mexico Border Distribution Agreement if the Debtor is wound up, dissolved or goes  
3 into liquidation.<sup>8</sup> If Diageo does terminate the Mexico Border Distribution Agreement, Diageo  
4 is entitled to repossess the products under the terms of that agreement, and the Debtor is no longer  
5 permitted to use the license to sell any products.<sup>9</sup>  
6

7           22.     The Mexico Border Distribution Agreement is a trademark license that contains  
8 the provisions necessary to establish the Debtor's use of the Diageo trademarks, including the  
9 right to use the trademarks, and the requirement that the Debtor only use the trademarks for the  
10 purposes of performing its obligations under the Diageo Products Distribution Agreements.  
11

12           23.     The Marine Distribution Agreement contained many of the same provisions.<sup>10</sup>

13           24.     The Diageo Products Distribution Agreements also incorporate by reference  
14 Diageo's standard conditions of sale (the "**Diageo General Conditions of Sale**").<sup>11</sup> The Diageo  
15 General Conditions of Sale provided standard terms that were not specifically tailored to Diageo's  
16 business relationship with Debtor, but nonetheless supplemented the terms of the Diageo Products  
17 Distribution Agreements to the extent the standard terms were consistent with and did not  
18 contradict the specifically negotiated terms in the Diageo Products Distribution Agreements.<sup>12</sup>  
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27           <sup>8</sup> Mexico Border Distribution Agreement at 21 ¶18.2.2.

28           <sup>9</sup> Mexico Border Distribution Agreement at 23 ¶19.2.1 and ¶19.2.6.1

<sup>10</sup> Marine Distribution Agreement, at 1-2 and Appx. I.

<sup>11</sup> Mexico Border Distribution Agreement, at 25, ¶22.2; Marine Distribution Agreement, at Appx. I.

<sup>12</sup> Mexico Border Distribution Agreement, at 11, ¶4.17; Marine Distribution Agreement, at 1.

1 A. The Diageo Products Distribution Agreements are governed by English law.

2 25. The writings that comprise the Diageo Products Distribution Agreement all  
3 contain a choice of law provision stipulating that the law of England (or England and Wales<sup>13</sup>)  
4 shall govern the contracts and related disputes.  
5

6 26. The Mexico Border Distribution Agreement contains the following choice of law  
7 clause:

8 27 GOVERNING LAW AND JURISDICTION

9 The creation performance and termination of this Agreement shall be  
10 governed by the laws of England and the parties hereto submit to the  
11 exclusive jurisdiction of the High Court of Justice located in London.

12 27. The Amendment to the Mexico Border Distribution Agreement contains the  
13 following choice of law clause:

14 5 GOVERNING LAW

15 This Amendment shall be governed and construed in accordance with the  
16 laws of England and Wales.

17 28. The Marine Distribution Agreement contains the following choice of law clause:

18 This agreement is governed by and shall be interpreted in accordance  
19 with English law.  
20

21 29. The Diageo General Conditions of Sale attached to the Marine Distribution  
22 Agreement contains the following choice of law clause:  
23  
24  
25  
26

27 <sup>13</sup> Choice of law of England v. England and Wales is a distinction without a difference as England and  
28 Wales share a common legal system within the UK. See Timothy H. Jones, *Wales, Devolution and Sovereignty*,  
Statute L. Rev., Vol. 33, no. 2, pg. 151 (UK 2012) (“There are three separate legal orders (England and  
Wales, Scotland and Northern Ireland), each supported by a separate legal system and court structure.”).



12 GOVERNING LAW AND JURISDICTION

These General Conditions and any Contract and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law and the parties submit irrevocably to the non-exclusive jurisdiction of the English courts. For the avoidance of doubt, the provisions of the Vienna Convention on the International Sale of Goods shall not apply to any Contract. In the event that these General Conditions or any Contract of which these General Conditions form part are translated into another language the English language version shall prevail.

30. Moreover, each Diageo invoice issued in conjunction with an order from the Debtor has a choice of law provision substantively identical to the choice of law provision in the Diageo General Conditions of Sale. For example, the invoices issued for shipments under the Mexico Border Distribution Agreement provide that the “General Conditions [of sale] and any Contract shall be governed by English law and the parties submit irrevocably to the exclusive jurisdiction of the English courts[.]” and the invoices issued for shipments under the Marine Distribution Agreement similarly provide that the “General Conditions [of sale] and any Contract and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law and the parties submit irrevocably to the exclusive jurisdiction of the English courts.”

31. So, every document that passed between Diageo and Debtor concerning the sale and shipment of Diageo Products consistently memorialized the parties’ intent for their business relationship to be governed by English law.

B. The Diageo Products Distribution Agreements contain express retention of title clauses that require Debtor to pay for the Diageo Products as a condition to the passage of title.

1           32. The Mexico Border Distribution Agreement includes a reservation of title  
2 provision wherein the title to the products remains with Diageo until Debtor paid for such  
3 products<sup>14</sup>:  
4

5           4.14 The title to any of the Products will not pass to the Distributor until the  
6 Company has received full payment of the price for the Products and  
7 all other amounts due from the Distributor. The Company will be  
8 entitled at any time to enter the premises of the Distributor and remove  
any Products in respect of which title has not passed to the Distributor.

9           33. Similarly, the Diageo General Conditions of Sale incorporated into the Marine  
10 Distribution Agreement, states:  
11

12           4 RISK AND TITLE

13           ...

14           4.2 Notwithstanding delivery and the passing of risk in the Products or  
15 any other provision of these General Conditions, legal and beneficial title  
in the Products shall not pass to the Customer until the Seller has received  
payment in full in cash or cleared funds of all amounts owing to the Seller  
by the Customer on any account whatever.

16           ...

17           4.4 Until title in the Products passes to the Customer, the Seller may at  
18 any time require the Customer to deliver up the Products to the Seller or  
19 as the Seller may direct and, if the Customer fails to do so forthwith, enter  
any premises of the Customer or any third party where the Products are  
20 stored and repossess the Products. The Customer will provide or procure  
the provision of access for the Seller to these premises so that the Seller  
may repossess the Products.

21           ...

22           4.7 The Customer may not in any way pledge or charge by way of security  
23 for any indebtedness any Products in which title has not passed to the  
24 Customer and if the Customer does or purports to do so all monies owing  
by the Customer to the Seller shall (without prejudice to any other rights  
or remedies of the Seller) become due and payable immediately.

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26  
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28           <sup>14</sup> *Id.* at 11 ¶4.14.

1           34. English law has a rich tradition in international trade as it has a long history of  
2 being selected as the governing law in transnational sales contracts, and as a result England has a  
3 well-developed body of reputable jurisprudence on this topic. It is unsurprising then that the  
4 Diageo Products Distribution Agreements are governed by English law, particularly given the  
5 close connection between Diageo and the UK, where it is headquartered and where the production  
6 of many of its trademarked goods originate.

8           C. Debtor is Holding Over \$4 Million of Diageo Products that Diageo Still Owns.

9           35. According to the Debtor's own records, it owes Diageo \$4,564,179.76.<sup>15</sup> Diageo's  
10 proofs of claim have the cumulative unpaid total as \$4,175,399.41.<sup>16</sup>

12                               **CAUSES OF ACTION**

13           A. Count 1 – Declaratory judgment that Diageo Products are not property of the Estate  
14 because Debtor has not satisfied the explicit condition precedent under the parties'  
15 contracts and English law to obtain title.

16           36. Diageo repeats and realleges the allegation set forth in all preceding paragraphs of  
17 this Complaint, as if fully set forth herein.

18           37. Pursuant to 11 U.S.C. § 541(a)(1), property of the Estate includes all legal and  
19 equitable interests of Debtor and property of Debtor as of the commencement of the case. As of  
20 the Petition Date, Debtor was in possession of the Diageo Products.

21           38. Under English law, and the contracts that govern the business relationship between  
22 Diageo and Debtor, ownership of the Diageo Products, meaning legal and beneficial title, remains  
23

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28           <sup>15</sup> See Amended Schedules, Dkt. No. 37, pg. 28 at §§ 3.80 and 3.81.

<sup>16</sup> See Proofs of Claim 104 and 105.

1 with Diageo because Debtor has not paid for the goods, and has therefore failed to satisfy the  
2 valid condition to obtain title.

3 39. An actual controversy and dispute exists between Diageo and the Trustee as to the  
4 Estate's interest in the Diageo Products, Diageo's legal and beneficial ownership of the Diageo  
5 Products, the applicability of the automatic stay and Diageo's right to seek turnover of the Diageo  
6 Products.  
7

8 40. A present adjudication of this controversy is necessary to guide the parties' future  
9 conduct in this proceeding. This Court has the authority, pursuant to 28 U.S.C. § 2201 and FED  
10 R. BANKR. P. 7001(1) and (9), to adjudicate this controversy.  
11

12 41. Section 2201 of the Judicial Code provides, in pertinent part, the following:

13 In a case of actual controversy within its jurisdiction ... any court of the United  
14 States, upon the filing of an appropriate pleading, may declare the rights and other  
15 legal relations of any interested party seeking such declaration, whether or not  
16 further relief is or could be sought. Any such declaration shall have the force and  
17 effect of a final judgment or decree and shall be reviewable as such.

18 28 U.S.C. § 2201.

19 42. Bankruptcy Rule 7001(1) and (9) requires that a proceeding to recover property  
20 and to obtain a declaratory judgment on such determination is required to be in the form of an  
21 adversary proceeding.

22 43. Pursuant to the parties' agreements, legal and beneficial title to the Diageo  
23 Products was never conveyed to the Debtor, and the Diageo Products should not be property of  
24 the Estate.  
25  
26  
27  
28

- 1 i. Diageo and Debtor chose English law to govern the Diageo Products Distribution  
2 Agreements, so that choice of law provides the framework for the parties' respective  
3 rights and interests in the Diageo Products.

4 44. The parties' business relationship is governed by the Diageo Products Distribution  
5 Agreements pursuant to which Debtor would purchase the Diageo Products for resale in duty free  
6 shops near the U.S./Mexico border and marine vessels such as cruise ships. As agreed between  
7 the parties, payment was a condition precedent to the passage of title in the Diageo Products. The  
8 Diageo Products Distribution Agreements provide the framework for the parties' rights and  
9 interests in the Diageo Products, which is critical to determining the scope of the Debtor's  
10 interests in property since property rights arise from underlying substantive law and are not  
11 created by virtue of Section 541 of the Bankruptcy Code. *See Perry v. Chase Auto Fin. (In re*  
12 *Perry)*, Nos. 1:09-bk-11476-GM, 1:10-ap-01043-GM, 2014 Bankr. LEXIS 1659, at \*31 (Bankr.  
13 C.D. Cal. Apr. 16, 2014) citing *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed.  
14 2d 136 (U.S. 1979) (The estate's rights and interests under Section 541 are determined under  
15 applicable non-bankruptcy law.). In this case, English law is the underlying substantive law that  
16 governs the issue of property rights.

17 45. The writings that comprise the parties' contractual relationship, including the  
18 Diageo Products Distribution Agreements, contain a choice of law provision stipulating that the  
19 law of England (or England and Wales) shall govern the contracts and related disputes. This  
20 contractual choice of law agreed to by the parties is valid and should be enforced by the Court.

21 46. Courts in the Ninth Circuit have analyzed the validity of choice of law clauses  
22 under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972),  
23 in which the Supreme Court stated that courts should enforce choice-of-law and choice-of-forum  
24 clauses in cases of "freely negotiated private international agreements." *Batchelder v. Nobuhiko*  
25  
26  
27  
28

1 *Kawamoto*, 147 F.3d 915, 918 (9th Cir. 1998) (citing *The Bremen*, 407 U.S. at 12-13); *see also*  
2 *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (en banc) (applying U.S.  
3 Supreme Court law to find English choice of law and forum clause enforceable).

4  
5 47. The Supreme Court in *Bremen* voiced a strong public policy in favor of  
6 recognizing international choice of forum and law<sup>17</sup> provisions, reasoning that “the elimination  
7 of all [] uncertainties [regarding the forum] by agreeing in advance . . . is an indispensable element  
8 in international trade, commerce, and contracting.” *The Bremen*, 407 U.S. at 12-13. *See also*  
9 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n. 11 (1974) (The Supreme Court has further  
10 explained that, in the context of an international agreement, there is “no basis for a judgment that  
11 only United States laws and United States courts should determine this controversy in the face of  
12 a solemn agreement between the parties that such controversies be resolved elsewhere.”).

14 48. This federal common law recognition of parties’ contractual choice of law in the  
15 context of international commercial contracts is consistent with other relevant authorities. *See*  
16 Restatement (2d) of Conflict of Laws 187(1) (“The law of the state chosen by the parties to govern  
17 their contractual rights and duties will be applied if the particular issue is one which the parties  
18 could have resolved by an explicit provision in their agreement directed to that issue.”); Uniform  
19 Commercial Code 1-301(a) (“Except as otherwise provided in this section, when a transaction  
20 bears a reasonable relation to this state and also to another state or nation the parties may agree  
21 that the law either of this state or of such other state or nation shall govern their rights and duties”);  
22  
23

24  
25  
26 <sup>17</sup> While the contract in *Bremen* did not contain a choice of law clause, the Supreme Court explicitly  
27 recognized that the forum selection clause also acted as a choice of law clause. *Id.* at 13 n.15 (“While the contract  
28 here did not specifically provide that the substantive law of England should be applied, it is the general rule in  
English courts that the parties are assumed, absent a contrary indication, to have designated the forum with the view  
that it should apply its own law. . . . It is therefore reasonable to conclude that the forum clause was also an effort  
to obtain certainty as to the applicable substantive law.”).

1 Hague Conference on Private International Law Principles on Choice of Law in International  
2 Commercial Contracts (US and UK are members) (“At their core, the Hague Principles are  
3 designed to promote party autonomy in international commercial contracts. By acknowledging  
4 that parties to a contract may be best positioned to determine which set of legal norms is most  
5 suitable for their transaction, party autonomy enhances predictability and legal certainty –  
6 important conditions for effective cross-border trade and commerce.”).

8         49. In *Richards*, citizens and residents of the United States sued a foreign firm in  
9 California district court under federal and state securities laws. *Id.* at 1291-92. Their investment  
10 agreement contained a forum-selection clause requiring the parties to adjudicate any disputes in  
11 “the courts of England” and under “the laws of England.” *Id.* at 1292. The plaintiffs argued that  
12 the forum-selection clause did not apply due to the antiwaiver provisions of the federal securities  
13 laws and the strong public policy of preserving investors’ remedies under federal and state  
14 securities laws. *Id.* at 1293-94. The court rejected the plaintiffs’ argument that the antiwaiver  
15 provisions barred enforcement of the forum-selection clause, holding, in effect, that the strong  
16 federal policy in favor of enforcement of such clauses superseded the statutory antiwaiver  
17 provision. *Id.* at 1294-95. In reaching this conclusion, the court acknowledged the vastly  
18 different outcome under English law given the defendant’s immunity for causes of action that  
19 would otherwise be available under US law, but nevertheless determined that English law offered  
20 sufficient protection. *Id.* at 1294.

24         50. Like the contract at issue in *Richards*, the Diageo Products Distribution  
25 Agreements contain valid choice of law clauses that determine the substantive law applicable to  
26 the issues of ownership, rights, and control of the Diageo Products. *See Milanovich v. Costa*  
27 *Crociere, S.P.A.*, 293 U.S. App. D.C. 332, 954 F.2d 763, 767 (D.C. Cir. 1992) (finding if “choice-  
28

1 of-law provision is enforceable, we will use the law that it selects to evaluate the enforceability  
2 of the remainder of the contract terms”).

- 3 ii. Under English Law, Diageo retains legal and beneficial title to the Diageo Products  
4 until Debtor pays the purchase price in full.

5 51. The Diageo Products Distribution Agreements require the application English law,  
6 and therefore, the particular statutory scheme that applies to the question of ownership of goods  
7 is the UK Sale of Good Act 1979, which specifically provides for the seller’s retention of title and  
8 superior right of possession until payment:  
9

10 In the United Kingdom provisions for inserting reservation of title clauses can be  
11 found in the Sale of Goods Act 1979. Pursuant to section 17, property passes when  
12 the parties intend it to pass, and following section 19(1) the seller can “reserve the  
13 right of disposal of the goods until certain conditions are fulfilled ...  
14 notwithstanding the delivery of the goods to the buyer ... the property in the goods  
15 does not pass to the buyer until the conditions imposed by the seller are fulfilled”.  
16 Hence the buyer may be given possession of the goods, but the seller can remain  
17 owner of them until the buyer discharges his contractual duties. The seller has the  
18 right to repossess the goods if the buyer defaults. But the seller is not regaining  
19 ownership (he never transferred it), he merely regains possession of the goods.

20 Giorgio Monti, Gilles Nejman, and Wolf J. Reuter, *The Future of Reservation of Title Clauses*  
21 *in the European Community*, 46 Int’l & Comp. L.Q. pp 866-907 (UK 1997). Thus, under English  
22 law until the agreed upon condition precedent has been satisfied the buyer owns no interest in  
23 the goods.

24 52. The “retention of title” concept is also explicitly incorporated into the UK’s  
25 insolvency law:

26 “retention of title agreement” means an agreement for the sale of goods to a  
27 company, being an agreement—

28 (a) which does not constitute a charge on the goods, but

(b) under which, if the seller is not paid and the company is wound up, the seller  
will have priority over all other creditors of the company as respects the goods or  
any property representing the goods;



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2 Insolvency Act 1986 (c. 45), s. 251.

3 53. UK courts enforce retention of title clauses in sales contracts and recognize a  
4 seller's right to reclaim goods that have not been paid for. For example, in *Clough Mill Ltd v*  
5 *Martin* [1984] 3 All ER 982, [1985] 1 WLR 111, the plaintiff supplied a quantity of yarn to a  
6 company called Heatherdale Fabrics Ltd on terms that the goods were to remain its property until  
7 paid for in full, although Heatherdale was granted the power to sell the goods or use them for the  
8 purpose of manufacturing products. The contract also provided that if any payment were overdue  
9 the plaintiff could recover or resell the goods and enter Heatherdale's premises for that purpose.  
10 When the defendant was appointed receiver of Heatherdale the plaintiff informed him that it  
11 wished to repossess the unused yarn and asked to be allowed to collect it. The defendant refused  
12 on the grounds that the retention of title clause amounted to a security interest and was void for  
13 non-registration and proceeded to allow Heatherdale to use the yarn. On appeal, the court held  
14 that ownership (referred to as "property" in English law parlance) in the yarn had not passed to  
15 Heatherdale. Since the yarn claimed by the plaintiff was at the time of their claim identifiable,  
16 unused and unpaid for, they retained legal and beneficial title to it and were entitled to damages  
17 against the receiver for wrongfully depriving them of possession.  
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21 54. In *Armour v Thyssen Edelstahlwerke AG* [1990] 3 All ER 481, [1991] 2 AC  
22 339 the defendant supplied steel to a manufacturing company under a contract which contained a  
23 retention of title clause. The plaintiffs, who had been appointed as receivers, brought proceedings  
24 against the supplier seeking a declaration that property in the steel had passed to the company,  
25 despite the fact that payment had not been made. The suppliers argued that the retention of title  
26 clause was effective to prevent title passing. The court agreed, referring to sections 17 and 19 of  
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28

1 the Sale of Goods Act 1979, and held that property passed when the parties agreed that it should  
2 pass and therefore not until the goods had been paid for.

3 55. In *Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd (t/a Leylands)*, [1996]  
4 BCC 957, the plaintiff supplied live animals to an abattoir under a contract which contained a  
5 retention of title clause. Both parties contemplated that the animals would or might be slaughtered  
6 before they had been paid for. When receivers were appointed over the abattoir the plaintiffs  
7 sought to enforce the retention of title clause in order to recover the remaining live animals and  
8 butchered meat which they alleged were their property. The court held that the clause related  
9 only to live animals and that when they were slaughtered the plaintiffs' title to them was  
10 extinguished.  
11

12 56. There are also numerous cases in which the receiver of an insolvent buyer agrees  
13 based on the retention clause to return unpaid goods in the possession of the insolvent buyer to  
14 the seller, thus reducing the seller's claim. See e.g., *Re BHT Group Ltd (in liquidation)*, 2015  
15 IECA 191 ( July 29, 2015) at ¶6 (reciting factual background that liquidating trustee "accepted  
16 that [goods delivered to insolvent buyer and still physically present at buyer's premises] were the  
17 subject matter of a valid retention of title clause, and [the trustee] accordingly discharged that  
18 sum [of the liquidated goods in the buyer's possession at the time of the asset sale]" to the seller);  
19 *Carroll Group Distributors Limited, Plaintiff v G and JF Bourke Limited (in Voluntary*  
20 *Liquidation) and Bourke (Sales) Limited (in Voluntary Liquidation)*, [1990] 1 IR 481 (affirming  
21 parties' agreement that seller was entitled to identified goods supplied to and in the possession of  
22 the insolvent buyer and the goods were returned to the seller reducing the buyer's indebtedness  
23 to the seller).  
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1           57. As for American courts, the recognition of contractual retention of title clauses as  
2 actually that, and not merely a reservation of a security interest, is not a completely foreign  
3 concept. In *Wave Maker Shipping Co. v. Hawkspere Shipping Co.*, 56 F. App'x 594 (4th Cir.  
4 2003), the court determined that maritime fuel bunkers were not subject to attachment of  
5 creditor's lien because the fuel contract between debtor and fuel supplier was governed by the  
6 UK Sale of Goods Act and contained a retention of title clause, so even though debtor had  
7 possession of the bunkers, title to the bunkers had not passed from supplier to debtor because it  
8 had not paid for them. *Id.* at 595. In *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 2009  
9 U.S. Dist. LEXIS 3095 (S.D.N.Y. Jan. 13, 2009), the court determined that the retention of title  
10 provision in the parties' distribution agreement was governed by Italian law, not the California  
11 Uniform Commercial Code, so the senior perfected lienholder's claim to the inventory was  
12 subordinate to the supplier's absolute title claim under Italian law. *Id.* at \*34. Finally, in *Usinor*  
13 *Industeel v. Leeco Steel Prods.*, 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002), while the court  
14 ultimately determined that the Illinois Uniform Commercial Code applied to the international sale  
15 of goods contract that did not contain a choice of law clause, which required the court to engaged  
16 in a "most significant contacts" analysis, it acknowledged that the result would be different if  
17 French law had applied because "under French law, the seller of goods has an absolute right to  
18 contract for title until payment." *Id.* at 866.

19           58. Under the parties' choice of English law, as well as pursuant to their explicit  
20 contractual agreement, Diageo retains legal and beneficial title to all Diageo Products that the  
21 Debtor has not paid for and such Diageo Products are not property of the Estate. This ownership  
22 right is superior to the bare possession had by the Debtor, and therefore Diageo seeks an order for  
23 declaratory relief stating as follows:  
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1 a. The Diageo Products that have not been paid for are not property of the Estate;  
2 and

3 b. The Trustee has no valid interest in the Diageo Products sufficient to retain  
4 possession of and sell the Diageo Products.  
5

6 B. Count 2 – Declaratory judgment that Diageo’s legal and beneficial title to the Diageo  
7 Products is superior to the claims of any other party, including Wells Fargo’s security  
8 interest in Debtor’s inventory.

9 59. Diageo repeats and realleges the allegation set forth in all preceding paragraphs of  
10 this Complaint, as if fully set forth herein.

11 60. Under English law, and the contracts that govern the business relationship  
12 between Diageo and Debtor, ownership of the Diageo Products, meaning legal and beneficial  
13 title, remains with Diageo because Debtor has not paid for the goods, and has therefore failed  
14 to satisfy the valid condition to obtain title. Consequently, Debtor did not have the power to  
15 convey a security interest in the Diageo Products to Wells Fargo.  
16

17 61. An actual controversy and dispute exists between Diageo and Wells Fargo as to  
18 their respective interests in the Diageo Products.

19 62. A present adjudication of this controversy is necessary to guide the parties’  
20 future conduct in this proceeding. This Court has the authority, pursuant to 28 U.S.C. § 2201  
21 and FED R. BANKR. P. 7001(2) and (9), to adjudicate this controversy.  
22

23 63. Section 2201 of the Judicial Code provides, in pertinent part, the following:

24 In a case of actual controversy within its jurisdiction ... any court of the United  
25 States, upon the filing of an appropriate pleading, may declare the rights and other  
26 legal relations of any interested party seeking such declaration, whether or not  
27 further relief is or could be sought. Any such declaration shall have the force and  
28 effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

1           64. Bankruptcy Rule 7001(2) and (9) requires that a proceeding to determine the  
2 validity, priority, or extent of a lien or other interest in property and to obtain a declaratory  
3 judgment on such determination is required to be in the form of an adversary proceeding.  
4

5           65. The security agreement between Debtor and Wells Fargo describes a broad  
6 security interest in all of Debtor's assets, including inventory. However, before Wells Fargo's  
7 security interest could attach to collateral and be enforceable against Debtor and third parties such  
8 as Diageo, Debtor had to have rights in the collateral or the power to transfer rights in the collateral  
9 to Wells Fargo. *See* Cal. U. Com. Code § 9203(b)(2).  
10

11           66. The Debtor cannot transfer or grant a security interest in rights or property that it  
12 does not have. It follows that if the Debtor does not have title to the Diageo Products that it does  
13 not have sufficient rights in the Diageo Products or the power to transfer Diageo's rights in the  
14 Diageo Products in order to pledge the Diageo Products as collateral. As explained in Count 1,  
15 under the Diageo Products Distribution Agreements, title to the Diageo Products did not convey  
16 to Debtor until they were paid for, so until that condition was satisfied, Debtor did not have  
17 sufficient rights in the Diageo Products to support the attachment of Wells Fargo's security  
18 interest. Moreover, Diageo never consented to Debtor's use of the Diageo Products as security,  
19 and the Diageo General Conditions of Sale explicitly prohibits Debtor from pledging unpaid  
20 Diageo Products as security for any indebtedness.  
21

22           67. Under the parties' choice of English law and the express terms of their agreements,  
23 Diageo retains legal and beneficial title to all Diageo Products that the Debtor has not paid for.  
24 This ownership right coupled with Diageo's lack of consent for the use of Diageo Products as  
25 security means that Debtor did not have sufficient rights in the Diageo Products for Wells Fargo's  
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1 security interest to attach. Therefore, Diageo seeks an order for declaratory relief stating that  
2 Wells Fargo's security interest did not attach to the unpaid Diageo Products.<sup>18</sup>

3 C. Count 3 – In the alternative, declaratory judgment that the Diageo Products Distribution  
4 Agreements are executory contracts that cannot be assumed and assigned without the  
5 consent of Diageo and may be terminated under applicable trademark law pursuant to  
6 365(e).

7 68. Diageo repeats and realleges the allegation set forth in all preceding paragraphs of  
8 this Complaint, as if fully set forth herein.

9 69. Diageo owns the registered, protectable trademarks for the Diageo Products, and  
10 the sale of Diageo's trademarked goods by unauthorized distributors raises the prospect of market  
11 confusion. Therefore, the distribution of Diageo Products requires Diageo's permission to use its  
12 intellectual property including its trademarks in connection with the marketing and sale of the  
13 goods. For that reason, Diageo is very selective with the companies it allows to distribute its  
14 products.  
15

16 70. The Diageo Products Distribution Agreements contain non-exclusive intellectual  
17 property licenses that establish strict parameters for the sale of Diageo's trademarked goods for  
18 the purpose of ensuring the protection of Diageo's global reputation, goodwill, brand recognition  
19 and integrity, and to prevent market saturation in certain territories.  
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26 <sup>18</sup> Even if the court were to find that Wells Fargo had a security interest in the Diageo Products, the Diageo  
27 Products Distribution Agreements prohibit assignment of any rights in the Diageo Products Distribution Agreements  
28 and prohibits the Debtor from granting a security interest in the Diageo Products to any third party. Pursuant to Cal.  
U. Com. Code § 9408, the anti-assignment provisions of the Diageo Products Distribution Agreements are overridden  
for the limited purposes of permitting a security interest to attach and be perfected. However, Wells Fargo will not  
be able to use or enforce the license under the Diageo Products Distribution Agreements and will not be able to use  
any Diageo trademark in connection with the exercise of any remedies under the Uniform Commercial Code.

1           71.     These circumstances give rise to an actual controversy and dispute between  
2 Diageo, the Trustee, and any prospective buyer of the Diageo Products as to their respective  
3 interests in the Diageo Products given Diageo's legally protectible intellectual property interests.  
4

5           72.     A present adjudication of this controversy is necessary to guide the parties'  
6 future conduct in this proceeding. This Court has the authority, pursuant to 28 U.S.C. § 2201  
7 and FED R. BANKR. P. 7001(2) and (9), to adjudicate this controversy.

8           73.     Section 2201 of the Judicial Code provides, in pertinent part, the following:

9           In a case of actual controversy within its jurisdiction ... any court of the United  
10 States, upon the filing of an appropriate pleading, may declare the rights and other  
11 legal relations of any interested party seeking such declaration, whether or not  
12 further relief is or could be sought. Any such declaration shall have the force and  
effect of a final judgment or decree and shall be reviewable as such.

13           28 U.S.C. § 2201.

14           74.     Bankruptcy Rule 7001(2) and (9) requires that a proceeding to determine the  
15 validity, priority, or extent of a lien or other interest in property and to obtain a declaratory  
16 judgment on such determination is required to be in the form of an adversary proceeding.  
17

18           75.     As previously alleged, the Diageo Products are not property of the Estate under  
19 applicable English law as well as under the explicit terms of the distribution agreements. Even if  
20 this Court finds that the Diageo Products are property of the Estate, the Trustee is precluded from  
21 using and selling the Diageo Products under both Section 365(c)(1) and 365(e)(2) of the  
22 Bankruptcy Code. The Trustee may not assume the Diageo Products Distribution Agreements  
23 without Diageo's consent under Section 365(c)(1) of the Bankruptcy Code. In addition, Diageo  
24 has the right to terminate the trademark license set forth in the Diageo Products Distribution  
25 Agreements because it is not required to accept performance from the Trustee under Section  
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1 365(e)(2) of the Bankruptcy Code.<sup>19</sup> If Diageo terminates the Diageo Products Distribution  
2 Agreements, Diageo has the right to repossess the Diageo Products under the terms of that  
3 agreement.<sup>20</sup> If the Trustee sells the Diageo Products without curing the payment default under  
4 the Diageo Products Distribution Agreements and obtaining Diageo's consent, the Trustee will  
5 be infringing on Diageo's trademarks. The same would be true of any entity that purchases the  
6 Diageo Products, unless Diageo consents. To the extent Diageo needs relief from stay to give  
7 notice of termination of the contract, upon such relief this complaint will serve as written notice  
8 under the Diageo Products Distribution Agreements that the Diageo Products Distribution  
9 Agreements are terminated, or as a request for Diageo to receive relief from stay in order to  
10 terminate the Diageo Product Distribution Agreements.  
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13 76. Section 365(c)(1) of the Bankruptcy Code generally provides that a trustee may  
14 assume or assign an executory contract whether or not the executory contract prohibits assignment.  
15 However, Section 365(c)(2) of the Bankruptcy Code provides an exception if "applicable law  
16 excuses" the non-debtor party "from accepting performance from the debtor or debtor in  
17 possession." 11 USC §365(c)(1)(A). Similarly, Section 365(e)(1) generally provides that a non-  
18 debtor counter party to an executory contract may not terminate the contract based upon the  
19 insolvency or financial condition of the debtor; and Section 365(e)(2) provides an exception to  
20 that general rule by providing that a non-debtor party may terminate an executory contract if  
21 applicable law excuses the non-debtor party from accepting performance from the trustee or an  
22 assignee of such contract. 11 USC §365(e)(2)(A). The applicable law referred to in Section 365  
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27 <sup>19</sup> Non-exclusive licenses for the use of intellectual property are executory contracts under the Bankruptcy  
28 Code. *In re Access Beyond Tech., Inc.*, 237 B.R. 32, 45-47 (Bankr. D. Del. 1999); *In re Golden Book Family*  
*Entm't, Inc.*, 269 B.R. 300, 309 (Bankr. D. Del. 2001).

<sup>20</sup> Mexico Border Distribution Agreement at 23 ¶19.2.1.



1 is any nonbankruptcy law, and trademark law is “applicable law” under Section 365 of the  
2 Bankruptcy Code. *In re XMH Corp.* 647 F3d 690, 697 (7th Cir 2011). Trademark licenses are  
3 personal in nature and the licensor is not required to accept performance from a third-party unless  
4 the licensor consents. *Me Renee World v. Elite World LLC*, 674 Appx 620, 622 (9<sup>th</sup> Circ. 2016)  
5 (“It is well established that a trademark license cannot be assigned without the consent of the  
6 owner of the mark.”); *N.C.P. Mktg. Group, Inc. v BG Star Prods., Inc. (In re N.C.P. Mktg. Group,*  
7 *Inc.)*, 337 BR 230, 237-238 (D Nev 2005) *aff’d* (9th Cir 2008) 279 Fed Appx 561 (unpublished  
8 opinion), *cert denied* (2009) 556 US 1145, 129 S Ct 1577 (“*NCP Marketing Group*”). Therefore,  
9 under Section 365(e)(2) of the Bankruptcy Code, because the Diageo Products Distribution  
10 Agreements are trademark licenses that prohibit assignment and permit the termination of the  
11 license upon the insolvency of the Debtor, Diageo is entitled to terminate the Diageo Products  
12 Distribution Agreements and is not required to accept performance of the Diageo Products  
13 Distribution Agreements from the Trustee. All sales of the Diageo Products by the Debtor are  
14 governed by the restrictions of the Diageo Products Distribution Agreements, and Diageo is not  
15 required to accept performance by the Trustee of those obligations under the Diageo Products  
16 Distribution Agreements because Diageo did not originally contract with the Trustee. The Diageo  
17 Product Distribution Agreements carefully limit the territory of sale and the standards and  
18 requirements for the use of its trademarked goods in order to protect its brand name consistent  
19 with a trademark license. Diageo should be permitted to terminate the Diageo Products  
20 Distribution Agreements and exercise its remedies under those agreements, including  
21 repossession of the Diageo Products. Section 365(e)(2) specifically refers to “the trustee” as  
22 being a party to whom the nondebtor party does not have to accept performance. Diageo  
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1 understands that it must request relief from stay to terminate the Diageo Products Distribution  
2 Agreements and requests relief from stay in connection with this declaratory relief action.<sup>21</sup>

3         77. Even if the Court determines that the Diageo Product Distribution Agreements  
4 cannot be terminated under Section 365(e)(2) of the Bankruptcy Code, based upon Ninth Circuit  
5 law the Trustee is not able to assume the Diageo Product Distribution Agreements without  
6 Diageo's consent. Pursuant to *Perlman v Catapult Entertainment, Inc. (In re Catapult*  
7 *Entertainment, Inc.)* 165 F3d 747. (9th Cir 1999) ("*Catapult*"), if applicable law excuses the  
8 performance by a nondebtor party, then the trustee cannot assume or assign the contract. The  
9 Ninth Circuit has determined that the plain meaning of Bankruptcy Code §365(c)(1) requires  
10 courts to consider a "hypothetical test" which means that "a debtor in possession may not assume  
11 an executory contract over the nondebtor's objection if applicable law would bar assignment to a  
12 hypothetical third party, even where the debtor in possession has no intention of assigning the  
13 contract in question to a third party." *Id.* at 750. While *Catapult* involved patent law, trademark  
14 law has been determined to be applicable law within the meaning of Section 365(c)(1), including  
15 in the Ninth Circuit. *N.C.P. Marketing Group, Inc* 337 BR at 237; see also, *In re XMH Corp.* 647  
16 F3d 690 (7th Cir 2011) (trademark licenses not assignable without clause expressly authorizing  
17 assignment); *Wellington Vision, Inc. v Pearle Vision, Inc. (In re Wellington Vision, Inc.)* 364 BR  
18 129 (SD Fla 2007); *In re Trump Entertainment Resorts, Inc.* 526 BR 116 (Bankr Del 2015). The  
19 analysis using trademark law as outlined in *NCP Marketing* is the same as in *Catapult*; once it is  
20 determined that the contract cannot be assigned, the Trustee cannot use the contract if the  
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28 <sup>21</sup> Diageo believes that it provided judicial economies by bringing all causes of action in one adversary proceeding rather than file a separate motion for relief from stay with respect to the Diageo Products Distribution Agreements. Diageo is prepared to file a motion for relief from stay at the court's request.

1 nondebtor party does not consent. Diageo has not consented to the Trustee assuming the Diageo  
2 Product Distribution Agreements, and because the Diageo Product Distribution Agreements are  
3 trademark licenses, the Trustee is not permitted to use the license provided under the Diageo  
4 Product Distribution Agreements to sell the Diageo Products.  
5

6 78. For these reasons, Diageo may terminate the Diageo Products Distribution  
7 Agreements under the ipso facto clause contained in each agreement, pursuant 11 U.S.C. 365(e).  
8 Upon termination the Trustee will not be able to sell the Diageo Products and Diageo may  
9 repossess all Diageo Products. In addition, the Diageo Product Distribution Agreements may not  
10 be assumed or assigned by the Trustee. Under the reasoning of *Catapult*, the Trustee currently  
11 does not have the right to use the trademark license or the right to use or sell the Diageo Products,  
12 unless Diageo consents. Under either analysis, the Trustee may not sell the Diageo Products  
13 under the Diageo Product Distribution Agreements.  
14

#### 15 **RELIEF REQUESTED**

16 Wherefore, Diageo respectfully requests that the Court enter judgment as follows:  
17

18 A. On Count 1, declaratory relief that the Diageo Products are not property of the  
19 Estate and there is no basis to allow the Trustee to retain possession of the Diageo Products.  
20

21 B. On Count 2, declaratory relief that no security interests, liens, or other claims have  
22 attached to the Diageo Products, and that Diageo's legal and beneficial ownership of the Diageo  
23 Products is superior to the Estate's interests and the claims of all other third-parties;  
24

25 C. On Count 3, alternative declaratory relief that the Diageo Products Distribution  
26 Agreements are executory contracts that may be terminated, and that the Debtor may not sell or  
27 use the Diageo Products without a license;  
28

D. For attorneys' fees and costs incurred herein; and

1 E. For such other and further relief as this Court may deem just and proper.

2 Dated: August 13, 2020

ROCHELLE MCCULLOUGH, LLP

3 By: /s/ Andrew E. Jillson

4 Andrew E. Jillson, *pro hac vice*

5 Kathryn G. Reid, *pro hac vice*

6 -and-

7 FRIEDMAN & SPRINGWATER LLP

8 By: /s/ Ellen A. Friedman

9 Ellen A. Friedman

10 Ruth Stoner Muzzin

11 Attorneys for Creditors

12 DIAGEO BRANDS BV, DIAGEO NORTH  
13 AMERICA, INC. AND DIAGEO SCOTLAND  
14 LIMITED  
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